

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 62214-5-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
HENRY FLOYD MAYNARD,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>July 20, 2009</u>
)	
)	

Cox, J. — A criminal defendant who places his character in issue by testifying as to his own past good behavior opens the door to examination of specific acts of misconduct unrelated to the crime charged that would be otherwise inadmissible.¹ Because the trial judge did not abuse her discretion in determining that Henry Maynard's testimony opened the door to examination on his prior conviction for fourth degree assault, we affirm.

Henry Maynard and his friend, Rodney, spent much of October 15, 2007 drinking heavily. Carol Whisenant became acquainted with Maynard and Rodney when she waited at a bus stop after work. After a brief conversation, she thought they were nice and she agreed to get a drink with them. When Whisenant learned the men were homeless and needed a place to sleep, she

¹ State v. Warren, 134 Wn. App. 44, 64-65, 138 P.3d 1081 (2006); State v. Brush, 32 Wn. App. 445, 448, 450-51, 648 P.2d 897 (1982).

invited them to sleep at her house that night.

Once at Whisenant's apartment, the three drank a bottle of wine. Shortly thereafter, Rodney fell asleep. Maynard and Whisenant continued talking for a little while and then Whisenant prepared to go to bed. As Whisenant got up from the couch where the two had been talking, Maynard grabbed her wrist and pulled her down, trying to kiss her. Whisenant politely told Maynard that she was not interested and continued walking to her bedroom. Maynard followed Whisenant into her bedroom and again tried to kiss her. Whisenant again pulled away and firmly told him she was not interested.

Whisenant then turned to take some items off her bed and Maynard called her name. When she turned to respond, Maynard hit her in the eye with his fist and called her a "bitch." Whisenant fell back on the bed and Maynard got on top of her and continued to hit her. Maynard also strangled her. Whisenant testified at trial, "He had both hands around my neck so tight I felt his nails. And, my neck, I thought he was going to kill me." She testified that she could not get Maynard off of her and that she could not breathe or scream. After being strangled, the next thing Whisenant remembered was waking up. When she went to the bathroom to look at herself, she was horrified by what she saw. Whisenant testified that her "eyes were nothing but purple and all the white was red like blood. I didn't know if my nose was broken, and my jaw. I was scared." Whisenant eventually called police.

The State charged Maynard with second degree assault and also alleged

that Whisenant's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the crime. On the first day of trial, the State amended the information, adding a first degree assault charge to the existing charge.

Maynard sought a continuance based on the State's late notice that it would try him on both charges. Counsel had previously discussed the State's plan to amend the Information, and defense counsel anticipated the State would proceed to trial only on the first degree assault charge. The judge denied the motion, finding the late notice did not prejudice Maynard because defense counsel had notice from the outset of the case about the charge of second degree assault with an aggravating factor.

At trial, the State presented testimony from Whisenant, Rodney, Seattle Police Officer Jason Bender, Detective Dana Duffy, Whisenant's treating physician Otolaryngologist Karen Peterson, and expert witness King County Chief Medical Examiner Richard Harruff.

Maynard testified on his own behalf. On cross-examination, the court found that Maynard's testimony opened the door to a previously excluded prior conviction for fourth degree assault.

A jury convicted Maynard of second degree assault and found the aggravating factor by special verdict. The trial court declared a mistrial on the first degree assault charge after jurors could not reach a verdict on that charge.

Based on the aggravating factor, the court entered findings and

conclusions and imposed an exceptional sentence of 64 months.

Maynard appeals.

ADMISSION OF PRIOR ASSAULT CONVICTION

Maynard argues the trial judge erred in determining that his testimony “opened the door” to his prior fourth degree assault conviction. We disagree.

A criminal defendant who places his character in issue by testifying as to his own past good behavior opens the door to examination of specific acts of misconduct unrelated to the crime charged.² We review a trial court’s determination that a party has opened the door for abuse of discretion.³

Here, prior to trial, the parties agreed that Maynard’s prior misdemeanor convictions, including a conviction for fourth degree assault, were not crimes of dishonesty and would therefore not be admissible unless he opened the door during his testimony.

At trial, Maynard testified during cross-examination that as a consequence of his heavy drinking he did not remember assaulting Whisenant. Maynard testified that he remembered sitting beside her on a bed, apparently after the assault. He recalled that she screamed at him to leave her apartment and said she was going to call the police. Maynard testified that he told her to call the police. When asked by the prosecutor why he wanted Whisenant to call

² State v. Warren, 134 Wn. App. 44, 64-65, 138 P.3d 1081 (2006); State v. Brush, 32 Wn. App. 445, 448, 450-51, 648 P.2d 897 (1982).

³ Warren, 134 Wn. App. at 65.

the police he testified:

Because I apparently hurt the woman. And, I'm not the type of person that goes around trying to hide from bad things. I apparently - - I put myself in a position to where, you know, I was ready to own up.^[4]

Near the end of this cross-examination, the State sought to introduce the previously excluded evidence of Maynard's fourth degree assault conviction, apparently arguing during a side bar that his statement had opened the door. The judge agreed and permitted the State to inquire into his prior conviction.

The judge later placed the substance of the side bar on the record, stating:

[The State's] contention was that ***by indicating and saying he was not the kind of person who would do this, referring to this particular assault***, he had opened the door to the fact that he had a prior for assault. And I agreed . . . [defense counsel] objected at side bar and I am noting your exception now. . . .^[5]

The judge then gave both counsel the opportunity to put on the record any additional information about the side bar that they thought important. Neither chose to add anything.

A fair reading of the State's cross-examination of Maynard and the court's record of the side bar indicates that both the court and the State relied on Maynard's testimony that is quoted above as opening the door to examination about his prior conviction for fourth degree assault. Maynard's testimony indicates he does not consider himself to be the kind of person who would hide

⁴ Report of Proceedings (June 16, 2008) at 21.

⁵ Report of Proceedings (June 16, 2008) at 33 (emphasis added).

from the commission of an assault. The reasonable interpretation of that statement by the court is that Maynard testified that he was not the kind of person who would commit an assault, the very charge at issue in this case. The trial court did not abuse its discretion in determining that this testimony opened the door to examination to establish that he had a prior fourth degree assault conviction.

Maynard disagrees, arguing that both the State and the court mistakenly concluded it was his later testimony that, “Rodney is not the type of person who would cause those injuries” that opened the door to his prior conviction. This makes no sense and would obviously be a basis for concluding that the trial judge and the State erroneously applied the law. We decline to reach that conclusion.

If that had been the basis of the court’s ruling, defense counsel would likely have clarified that point when offered the opportunity by the trial judge to make additional comments to her summary of the side bar. Defense counsel did not. Moreover, we are not persuaded by Maynard’s argument that the timing of the side bar, which occurred almost immediately following Maynard’s statement about Rodney, shows that the court based its determination on the statement about Rodney. Lastly, we are also not persuaded that there is any significance in the fact that the State waited until the close of its cross-examination of Maynard to seek a ruling on whether Maynard had “opened the door.” For these reasons, we adhere to our conclusion that the trial court did not abuse its

discretion in ruling as it did.

ADDITIONAL GROUNDS FOR REVIEW

Maynard raises several issues in his statement of additional grounds for review. None requires relief.

Maynard argues the trial court abused its discretion by denying his motion for a continuance. A trial court's denial of a continuance is an abuse of discretion if it deprives the defendant of a fair trial and due process of law, within the circumstances of the case.⁶

Here, the trial judge concluded that Maynard was not prejudiced by the late amendment because defense counsel knew of the second degree assault and aggravating factor charge from the outset of the case and also had notice of the possible amendment. Because Maynard fails to show he was prejudiced by the court's denial of his motion, his argument fails.

Maynard next argues that the aggravating factor instruction is unconstitutionally vague. He contends that the statutory definition of strangulation does not specify any degree of bodily harm, yet the aggravating factor requires the jury to find that the resulting injuries substantially exceed the level of bodily harm necessary to satisfy the elements of second degree assault by strangulation.

As an initial matter, we note that generally, the void for vagueness doctrine does not apply to a sentencing scheme.⁷ Further, the statute and

⁶ State v. Purdom, 106 Wn.2d 745, 751, 725 P.2d 622 (1986).

aggravating factor are not unconstitutionally vague because the statutory definition of strangulation properly describes the level of bodily harm required.⁸

Maynard next argues the prosecutor committed misconduct. A defendant claiming prosecutorial misconduct bears the burden to establish that the prosecutor's conduct was both improper and prejudicial.⁹ Maynard argues the prosecutor intentionally misled his counsel to believe that the State would be dismissing the charge of second degree assault by strangulation and amending the Information to charge only first degree assault. He contends this was lying and, thus, misconduct on the part of the State.

A review of the record shows that although the prosecutor failed to meet a notice deadline set by the parties, the State did not intentionally mislead defense counsel. The judge admonished the State to abide by the agreed deadlines, but found no resulting prejudice to the defense. There was no prosecutorial misconduct resulting in prejudice to Maynard.

Maynard next argues he received ineffective assistance of counsel apparently because counsel did not present a diminished capacity defense and because he did not receive any mitigation assistance at sentencing. He also contends that counsel repeatedly refused to bring a motion alleging

⁷ See State v. Stubbs, 144 Wn. App. 644, 650, 184 P.3d 660 (2008) (addressing a void for vagueness challenge to a first degree assault aggravating circumstance instruction).

⁸ RCW 9A.04.110(26).

⁹ State v. Korum, 157 Wn.2d 614, 650, 141 P.3d 13 (2006).

“overzealous, malicious, selective prosecution” by the State. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.¹⁰

This record does not support Maynard’s claims. Maynard’s counsel asserted a general denial and/or voluntary intoxication defense, arguing that he did not form the requisite intent for first degree assault because of intoxication. Counsel cross-examined witnesses, including the State’s expert, and presented Maynard’s testimony. In addition, contrary to his claim that he received no mitigation assistance, the social worker who Maynard worked with submitted a psychosocial assessment report to the court as part of Maynard’s sentencing recommendation. Finally, nothing in this record suggests there is a basis for a motion alleging malicious prosecution by the State. Maynard fails to show how counsel’s performance was deficient.

Maynard next argues that his conviction violates double jeopardy. It does not. His claim is more properly characterized as a challenge to the sufficiency of the State’s evidence. Evidence is sufficient to support a conviction if, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.¹¹

¹⁰ Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Here, contrary to Maynard's contention, the jury was not required to find that Maynard created the probability of death in order to convict him of second degree assault by strangulation or to find the aggravating factor by special verdict. The court instructed the jury that strangulation means "to compress a person's neck and thereby obstruct the person's blood flow or ability to breathe, or to compress a person's neck with the intent to obstruct the person's blood flow or ability to breathe."¹² We note that this definition does not require that any visible injury results.

The jury heard testimony that the strangulation caused Whisenant to lose consciousness and caused bruising and swelling in her face, neck, and eyes. Whisenant also had trouble swallowing and experienced changes to her voice. Her treating physician testified that she suffered a displaced laryngeal fracture, which required surgery and the insertion of two titanium plates. Expert testimony also established that the severity of petechiae — an injury resulting from sustained pressure causing blood vessels in the face and eyes to burst — indicated the level and type of force used in strangulation. The expert testified it takes about 30 seconds of sustained pressure to produce petechiae. The expert also testified that the bruising and petechiae injuries visible in photographs of Whisenant were consistent with her account of multiple blows and strangulation. This evidence is sufficient to support the jury's verdicts for both second degree

¹¹ State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

¹² Clerk's Papers at 28 (Jury Instruction 14).

assault and the aggravating factor.

Maynard next takes issue with the exceptional sentence of 64 months that the judge imposed. He argues it is “excessive and cruel punishment” in light of an offender score of zero, minimal criminal history, and diagnosed mental disorders. Maynard does not argue that his sentence is not legally justified. He merely contends that he would have benefited from rehabilitation rather than an extended stay in prison. This is not a compelling reason to vacate his exceptional sentence. Moreover, we note that Maynard’s exceptional sentence is supported by the jury’s special verdict as well as findings and conclusions entered by the trial court.

Maynard next argues that his right to a speedy trial was violated because the prosecutor had other trials that ended only four days before his trial and his own counsel was on vacation the week before his trial. He contends these incidents were “arbitrary, oppressive, vexatious, and prejudicial” to his case, thereby violating his constitutional right.¹³ But Maynard fails to explain how his trial was delayed or point to any evidence of such a delay. Likewise, he does not show how any alleged delay resulted in an unfair trial.

Maynard also argues that these incidents were “unavoidable circumstances” that “played a part in the delay of notice,” requiring an extension

¹³ See State v. Jestes, 75 Wn.2d 47, 52-53, 448 P.2d 917 (1969) (“If the delay has been arbitrary, oppressive, vexatious or prejudicial to the defendant's case, and violates high standards for the administration of criminal justice, or would otherwise in all its ramifications amount to such a delay as to engender an unfair trial . . . it abridges the constitutional right to a speedy trial.”).

of time to prepare for trial. As we have already discussed, the court did not abuse its discretion in denying Maynard's motion to continue.

Finally, Maynard argues that cumulative error deprived him of a fair trial. Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effects of the errors denied the defendant a fair trial.¹⁴ Because we concluded that no errors occurred in this case, Maynard's argument is unavailing.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Leach, J.

Becker, J.

¹⁴ State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).